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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

GREENE COUNTY PLANNING BOARD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–29a) is reported at 455 F. 2d 412. The order of the Federal Power Commission (App. E, *infra*, pp. 50a–63a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 30a) was entered on January 17, 1972. The petition of the Commission for rehearing and sug-

gestion for *en banc* consideration thereof was denied on March 10, 1972 (App. C, *infra*, pp. 31a–32a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, requires the staff of the Federal Power Commission to prepare a detailed draft environmental statement in a contested licensing proceeding under the Federal Power Act, 16 U.S.C. 791a, prior to the holding of hearings by a hearing examiner under the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, on the license application, when one of the purposes of the hearings is to obtain evidence on the environmental impact of the proposed project for which the license is sought.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act, 42 U.S.C. 4332, provides in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * * *

STATEMENT

This case involves the requirements contained in Section 102(2)(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4332(2)(C), that federal agencies prepare detailed environmental impact statements with respect to proposals for major federal actions and that such statements

accompany the proposals "through the existing agency review processes." The court below construed Section 102(2)(C) to require the staff of the Federal Power Commission to prepare a detailed environmental impact statement in a licensing proceeding for use at hearings to be held on the license application (App. A. *infra*, p. 18a), even though one of the purposes of the hearings is to obtain evidence on the environmental impact of the proposed project for which the license is sought.

The controversy had its genesis in an application filed in August 1968, pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), by the Power Authority of the State of New York ("PASNY") to construct, operate and maintain a pump storage project along Schoharie Creek near the towns of Blenheim and Gilboa, New York. In addition to this principal project work, the application requested approval for three 345 kilovolt transmission lines running to Delhi, New Scotland, and Catskill, New York, respectively.

Although notice of the application was published in the surrounding area, no interventions were filed and in June 1969 the Commission granted a license to PASNY to construct, operate and maintain the Blenheim-Gilboa project (41 FPC 712). While the Commission also licensed the three 345 kv transmission lines, Article 34 of the license specifically prohibited construction of the lines until further Commission approval was given to "plans for preservation and enhancement of the environment as it may be affected by the transmission lines['] design, and location" (41

FPC at 718). In formulating these plans, PASNY was instructed to "give appropriate consideration to recognized guidelines for protecting the environment and to beneficial uses, including wildlife, of the transmission lines['] rights of way" (41 FPC at 718).

Pursuant to Article 34, PASNY applied for authorization to construct the three proposed transmission lines in November 1969. Following notice of the proposed construction, several protests and interventions were filed, including that of respondent, the Greene County Planning Board, in connection with one of the three lines—the line from Gilboa to the Leeds substation near Catskill, New York. After the Commission's staff examined the possible environmental impact of the two uncontested lines, the Commission approved their construction, but reserved consideration of the Gilboa-Leeds line (43 FPC 521).

In December 1970, PASNY filed two alternative proposals for routing the Gilboa-Leeds line, and in March 1971, pursuant to Section 2.81 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 2.81,[1] submitted to the Commission and served on all parties a detailed environmental statement, showing three possible variations of the alternate routes. Following review by the Commission's staff for form, the statement was circulated for comment to various fed-

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[1] 18 C.F.R. 2.80, 2.81 and 2.82—the rules promulgated by the Commission to implement the policies expressed in NEPA—were revised in November 1971. 36 Fed. Reg. 22738-22741. The Commission's order amending the rules is set forth as Appendix D, *infra*, pp. 33a–49a). The procedures embodied in the rules are discussed at pp. 10–11, *infra*.

eral and state agencies and made available to the public.

Subsequently, the Commission ordered a hearing on PASNY's proposals (R. 530–532).[2] At a prehearing conference, Greene County requested the hearing examiner to set a date for the filing of the Commission's environmental impact statement. Finding that the requested action would cause an indefinite delay and that the matter could be effectively handled by the Commission at the conclusion of the hearing and upon the issuance of an initial decision, the examiner denied the motion (R. 628, 630, 632). Greene County appealed to the Commission from the examiner's order, claiming that the refusal to require the staff to prepare a draft environmental statement prior to the hearing violated Section 102 of NEPA. Because the Commission did not act on the appeal within thirty days, the appeal was denied by operation of law (see 18 C.F.R. 1.28 (c)).

The Commission granted Greene County's subsequent application for rehearing, but refused to require the staff to file a detailed environmental statement (App. E, *infra*, pp. 59a–61a, 63a). The Commission noted that its staff is not required by the Commission's rules to prepare a draft environmental statement in advance of hearings (App. E, *infra*, p. 54a). The Commission stated, however, that the staff is required to make every effort to assure that the records of the licensing proceedings are complete and is required, upon completion of the hearings, to propose an environmental statement to

[2] "R." refers to the record before the Commission as certified to the court of appeals.

assist the examiner and the Commission in meeting their responsibilities under both the Federal Power Act and NEPA and to enable the Commission to include a detailed environmental statement in its final order in the proceeding, after all interested parties have been heard (App. E, *infra*, pp. 54a–55a). See 18 C.F.R. 2.81(e) (App. D, *infra*, p. 45a)

On petitions for review, the court of appeals focused on the requirements contained in Section 102(2)(C) of NEPA that federal agencies prepare environmental impact statements on proposals for major federal action, that the agencies consult with other federal agencies prior to preparing the statements and that the statements accompany the proposals "through the existing agency review processes." The court concluded that the consulting requirement had been met in this case by the circulation of PASNY's proposals to other federal agencies (App. A, *infra*, pp. 17a–18a), but held that the Commission had failed to prepare an environmental impact statement in time for it to accompany PASNY's proposals "through the existing agency review processes," which, in its view, included the hearings (App. A, *infra*, pp. 16a–17a). Accordingly, the court ordered the staff to prepare a detailed environmental impact statement prior to the closing of the hearing. In addition, the court held that the intervenors must be given an opportunity to cross-examine both PASNY's and the Commission's witnesses in light of the statement (App. A, *infra*, p. 18a).[2]

[2] While the Commission's petition for rehearing was pending before the court of appeals, the Commission ordered all participants in the proceeding to submit certain environmental information and ordered the staff to prepare an impact statement on the basis of such information for use at a subsequent hear-

REASONS FOR GRANTING THE WRIT

The issue presented by this case is of fundamental importance not only to the Federal Power Commission's administration of both the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Natural Gas Act, 15 U.S.C. 717 *et seq.*, but also to the effective discharge by other federal licensing agencies of their statutory obligations.[4] The decision below, in construing Section 102(2)(C) of NEPA to require the Commission's staff to prepare a draft environmental impact statement prior to hearings on the environmental impact of PASNY's proposals, fails to take properly into account the nature of adversary licensing proceedings and would, in its reasoning, unjustifiably impose inflexible procedures in this area on all federal agencies. If not overturned, the court's interpretation of NEPA will severely restrict the ability of the Com-

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ing, Project No. 2685, Order Adopting Procedure for Hearing (March 7, 1972). Following denial of the petition for rehearing and the Solicitor General's determination that this petition would be filed, the Commission entered a subsequent order rescinding in part its earlier order and staying the proceedings pending final review by this Court. Project No. 2685, Order Partially Rescinding Order of March 7, 1972 and Staying Further Proceedings (June 1, 1972). This latter order was deemed necessary to preserve the status quo and prevent the case from becoming moot before review by this Court.

[4] The Interstate Commerce Commission and the Civil Aeronautics Board, both licensing agencies, have expressed particular concern to us over the possible impact of the decision below on their operations. Other federal agencies who have indicated support for our position in this case are: the Atomic Energy Commission, the Federal Trade Commission, the Federal Maritime Commission, the Department of Transportation and the Law Enforcement Assistance Administration within the Department of Justice.

mission and other federal agencies which conduct licensing hearings to develop procedures tailored for the orderly discharge of their responsibilities.

1. Section 102 of NEPA provides that "to the fullest extent possible," federal agencies shall include in reports on proposals for major federal action an environmental impact statement by the "responsible official" and that the statement shall accompany the proposal through the "existing agency review processes." In our view, these provisions do not require preparation of a statement by the Commission's staff prior to the examiner's hearings in adversary licensing proceedings.

In the first place, the staff is not collectively the "responsible official" for determining whether a license should be granted in a given proceeding. Cf. *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1359 (C.A. 2), certiorari denied, 404 U.S. 827. The staff's function in licensing proceedings is to examine licensing applications and participate in hearings to assure that all relevant issues are fully explored.[2] Under long-established Commission practice, it is the hearing examiner who is responsible for ruling on the merits of an application in the first instance.[3] Yet, under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, the hearing examiner (and the

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[2] By requiring the staff to prepare an environmental impact statement prior to the hearing, the decision below may have the practical effect of forcing the staff to take a position on environmental issues prior to the submission of relevant evidence by participants in the hearing.

[3] Initial decision by the hearing examiner may, however, be waived. See 18 C.F.R. 1.30(c).

Commission as well) can proceed only on the basis of a record developed at a hearing. Thus, in licensing proceedings, there is no "responsible official" who can prepare an impact statement prior to the completion of hearings.

It is also doubtful whether the "agency review processes," referred to in Section 102(2)(C), include the hearings conducted in licensing proceedings. The hearings are fundamentally a vehicle for compiling relevant evidence on the merits of a given proposal; only when the hearings are completed, does the task—initially assigned to the examiner—of weighing the evidence and reaching a decision on the merits begin.

2. The procedures adopted by the Commission in response to the National Environmental Policy Act (App. D., *infra*, pp. 42a–49a)[7] comply with both the letter and the spirit of the Act and assure that environmental issues will be promptly identified and fully considered in licensing proceedings. Under those procedures, an applicant for a license under the Federal Power Act must submit a draft environmental impact statement with his application specifically covering the factors set forth in Section 102(2)(C) of NEPA. 18 C.F.R. 2.80(b), 2.81(b), 4.41, Ex. W. Following an initial review by the staff, the statement is circulated to all appropriate federal and state agencies for comments and made available to the public. 18 C.F.R. 2.81(b).

[7] As noted above (p. 5 n. 1, *supra*), the procedures were revised in November 1971 while this case was pending before the court below. Since the revised procedures would govern all further proceedings in this case, the decision below, in effect, struck down those procedures.

The applicant, staff and intervenors taking a position on environmental matters are directed to offer evidence at the hearing in support of their respective environmental positions and must, in their initial and reply briefs filed before the examiner, specifically analyze and evaluate the evidence in the light of the environmental criteria contained in Section 102(2)(C) of NEPA. 18 C.F.R. 2.81(d), (e). The initial decision of the examiner must contain a similar analysis, which may be controverted in briefs on exceptions and briefs opposing exceptions to that decision before the Commission. If the Commission, upon review of the examiner's decision, grants the application, its decision will include a final detailed environmental statement. 18 C.F.R. 2.81(e).

In short, the environmental issues are identified prior to the hearing by the applicant's draft environmental statement and by comments from interested agencies and intervenors. See 18 C.F.R. 2.81(e). The hearing then serves as a vehicle for developing the issues more fully. On the basis of the hearing record, the issues are fully analyzed by the participants for the benefit of the examiner, whose initial decision can properly be construed as the "detailed statement" by the "responsible official" required by Section 102(2)(C) of NEPA. With the full benefit of these comprehensive analyses, including further analyses in the briefs filed before the Commission supporting or opposing the examiner's decision, the Commission is in a position to weigh the environmental consequences of the proposed project in reaching a final decision on the merits of the application.

3. The decision below, in imposing a uniform procedure on all federal agencies for complying with NEPA, fails to recognize the critical distinctions between licensing and constructing agencies—*i.e.*, agencies which themselves initiate and promote federal projects. A constructing agency has all the elements of a proposal within its control from inception and the ability to direct its staff resources to the projects it considers most important; a licensing agency, on the other hand, lacks control of the information necessary to reach a decision and the resources necessary to assume the burden of production and proof of environmental consequences on all applications whose approval would constitute major federal action. Consequently, a licensing agency must depend on the evidentiary record developed by input from all interested parties, including its staff, as its primary source of data.

Moreover, constructing agencies can effectively limit the number of projects under consideration at a given time. No such option is available to a licensing agency. The Commission, for example, during fiscal year 1970 received, with respect to proposed or existing hydroelectric projects, 193 applications for preliminary permits, licenses or changes in existing licenses. Federal Power Commission 1970 Annual Report, p. 33. For the same period, requests for natural gas pipeline certifications, abandonments, and interconnections totaled 234. *Id.* at 63. Of course, not all applications involve "major Federal actions" requiring impact statements under Section 102(2)(C) of NEPA.

Under the decision below, the staff would be required to prepare complete environmental studies on each application prior to the holding of hearings. In view of the limited staff of the Commission, inordinate delays would result. Moreover, in light of the Commission's procedures discussed above, compliance with the decision below is unlikely to increase the scope of consideration already given by the Commission to environmental issues. In short, the court of appeals has imposed an inappropriate, inflexible procedure on the Commission mandated by neither logic nor the language of Section 102(2)(C) of the National Environmental Policy Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SAMUEL HUNTINGTON,
Assistant to the Solicitor General.
GORDON GOOCH,
General Counsel,
LEO E. FORQUER,
Solicitor,
PLATT WALKER DAVIS III,
Attorney,
Federal Power Commission.

JUNE 1972.

APPENDIX A

United States Court of Appeals for the Second Circuit

Nos. 434, 435—September Term, 1971

(Argued December 16, 1971; Decided January 17, 1972)

Dockets Nos. 71-1991, 71-1996

71-1991

GREENE COUNTY PLANNING BOARD, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, THE SIERRA CLUB, INTERVENORS

(Consolidated with 71-1996)

71-1996

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

(Consolidated with 71-1991)

Before: SMITH, KAUFMAN, AND MULLIGAN, *Circuit Judges.*

367-518—72——2

KAUFMAN, *Circuit Judge:*

We are called upon to assess the licensing procedures of the Federal Power Commission in a proceeding upon the application [1] of the Power Authority of the State of New York (PASNY) for authorization to construct a high-voltage transmission line. Although the petitioners—Greene County Planning Board, the Town of Durham, New York, and the Association for the Preservation of Durham Valley—raise several interesting arguments, the dispute centers on compliance with the procedural mandates of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. § 4332(2)(C), which requires all federal agencies to issue a "detailed statement" on the environmental impact of all "major Federal actions significantly affecting the quality of the human environment . . . ." This sec-

[1] Application was made to Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), which provides in pertinent part:

"The Commission is hereby authorized and empowered—

* * * * *

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam * * *."

tion is an essential "action forcing" provision[2] in legislation designed "[t]o declare a national policy which will encourage productive harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."[3] NEPA § 2, 42 U.S.C.A. § 4321. In addition, petitioners ask us to decide that the Commission has discretion in the public interest, to pay the attorneys' fees and other expenses of the intervenors in the proceedings. We find that the Commission has not complied with NEPA and remand for further proceedings, but under the circumstances presented to us, we refuse to order the Commission or PASNY to pay the expenses and counsel fees of the private intervenors.

A brief statement of the proceedings thus far will aid in comprehending the arguments advanced. On August 15, 1968, PASNY filed an application to construct, operate and maintain a 1,000,000 kilowatt pumped storage power project[4] along the middle

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[2] *See* S. Rep. No. 91-296, 91st Cong., 1st Sess. 20 (1969); *Environmental Quality, the Second Annual Report of the Council on Environmental Quality* ch. 5, (Aug. 1971), reprinted in 1 Environmental L. Rep. 50057, 50064 [hereinafter cited as *CEQ Report*].

[3] *See generally* Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230 (1970); Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 Environmental L. Rep. 50035.

[4] A pumped storage power facility is designed to provide energy during the hours of peak kilowatt demand. The functioning of such a facility is explained in our decision in *Scenic*

reaches of Schoharie Creek in the towns of Blenheim and Gilboa, New York, some forty miles southwest of Albany. The project as proposed, *inter alia,* consisted of: (1) an upper reservoir; (2) a lower reservoir (including a dam across Schoharie Creek); (3) an outdoor power house and (4) three 345 kilovolt transmission lines—one from the switchyard adjacent to the powerhouse to a substation at New Scotland, one to a substation at Fraser and the last to a substation at Leeds.[5] After consulting with several federal agencies, the Commission granted the license. Power Authority of the State of New York, Project No. 2685, 41 F.P.C. (June 6, 1969). Article 34 of the license, however, specifically prohibited construction of the transmission lines until further Commission approval was given to "plans for preservation and enhancement of the environment as it may be affected by the transmission lines design and location."[6] *Id.* at 718. In preparing the plans, PASNY was required to "give appropriate consideration to recognized guidelines for protecting the environment and to beneficial uses, including wildlife, of the transmission lines right-of-way." *Ibid.*

PASNY applied for construction authorization of the three lines on November 24, 1969. When no pro-

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Hudson Preservation Conference v. *Federal Power Commission*, 354 F. 2d 608, 612 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966). *See also* Loving, *A Vast New Warehouse for Electricity*, Fortune 88 (Dec. 1971).

[5] Exhibit R to PASNY's application proposed a recreational use plan including overlook areas and a State Park.

[6] Other restrictions on the license included provisions for flood control, additional studies with respect to fish and wildlife resources, protection for the covered Blenheim Bridge and development of a plan to blend the project works with the natural view.

tests or petitions were filed with respect to the Gilboa-New Scotland and Gilboa-Fraser lines, the Commission approved construction of these two lines without holding a hearing. Power Authority of the State of New York, Project No. 2685, 43 F.P.C. 521 (April 10, 1970). Nevertheless, the Commission, after conducting a full inspection and conferring with PASNY's staff and consultants, "concluded that from an aesthetic and environmental values point of view, the selected locations of the two lines involved herein are preferable to all of the alternative routings that were considered." *Id.* at 522–23.

The Commission, however, received several protests with respect to the Gilboa-Leeds line which was to run from the project in Schoharie County, through the Durham Valley, past the town of Durham (in Greene County) to the Leeds Substation less than two miles from the Hudson River near Catskill. Motions to intervene were filed by the Greene County Planning Board, the Town of Durham, the Association for the Preservation of the Durham Valley,[4] the Sierra Club and several individuals.[5] Intervention was granted on May 19, 1970, but participation was limited to the issues raised in the petitions to intervene—namely, the impact of the line on the Durham Valley in particular and Greene County in general.

NEPA became effective on January 1, 1970, after PASNY applied for the transmission line permits, but before the permits were issued for the Gilboa-New

[4] The Association is a voluntary, unincorporated, nonprofit association organized in 1969 to protect and preserve the scenic, historical and ecological values of the Durham Valley area. In January, 1970, the Association had over 100 members who in the aggregate owned more than 5,000 acres of land in Durham Valley and its immediate vicinity.

[5] The individual intervenors own land in the Durham Valley.

Scotland and Gilboa-Fraser lines. It was not until almost a year later, on December 2, 1970, that the Commission issued Order No. 415 to implement procedures in accord with NEPA. 18 C.F.R. §§ 2.80–.82 (January 1, 1971). Section 2.81(b) of the regulations required each applicant for a license for a "major project" to file its own detailed statement of environmental impact, developing fully the five factors listed in section 102(2)(C) of NEPA.[9] Although the regulations required the Commission staff to prepare a detailed statement in the case of all uncontested applications, no such statement was required where applications were contested.[10] *See* 18 C.F.R. §§ 2.81(e)–(f) (January 1, 1971).

In accordance with Commission regulations, PASNY filed its impact statement on March 21, 1971, covering the proposed Gilboa-Leeds line and two alternative routings. The Commission reviewed the statement as to sufficiency of form, *see* 18 C.F.R. § 2.81 (b) (January 1, 1971), and then circulated it for

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[9] The five factors are:

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

"(iii) alternatives to the proposed action.

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

[10] Under Section 2.81(e)(1), the Commission staff was expected to "specifically analyze and evaluate the evidence in the light of the environmental criteria * * *."

The Commission revised its rules by Order No. 415-B, issued November 19, 1971, 36 Fed. Reg. 22738 (Nov. 30, 1971). Section 2.81 no longer requires the Commission to prepare its own statement in uncontested proceedings.

comment to agencies with "special expertise with respect to any environmental impact involved."[11] *See* NEPA § 102(2)(C) 42 U.S.C.A. § 4332(2)(C).

Finally, by order issued May 4, 1971, the Commission ordered a hearing on PASNY's proposals and set a prehearing conference for June 22, 1971. At this conference, Durham and Greene County moved that PASNY, or alternatively the Commission, pay the expenses and fees, including attorneys' fees, incurred by the intervenors in the proceeding. Greene County also requested the Presiding Examiner to set a date for the Commission to file its own impact statement pursuant to NEPA. Then, by motions filed July 6 and July 12, 1971, the intervenors moved for an order vacating, rescinding or suspending the June 6, 1969, license of the entire project and enjoining further construction, alleging that the Commission did not comply with the notice requirements of the Federal Power Act and the mandates of NEPA.[12]

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[11] The statement was circulated to the Hudson River Valley Commission, the Secretary of the Interior, the Secretary of Agriculture, the Army Corps of Engineers, the New York Department of Environmental Conservation and the Environmental Protection Agency.

[12] Intervenors made several motions, either orally or in writing, which are not recounted here, since they were merely variations of the theme we already have presented.

Intervenors, however, unsuccessfully moved that they be provided copies of the transcript without charge, that their non-expert witnesses be allowed to testify orally without first filing written testimony, and that the hearings be held in Greene County. The Commission denied appeals from the Presiding Examiner's decisions, noting that it is within his discretion to determine procedural matters relating to the hearings. Although petitioners preserved their objections to the Presiding Examiner's decisions by petitioning for review of the Commission's orders, they have not raised these issues on appeal. Nevertheless, we are constrained to note that the Commission at nearly every

The Presiding Examiner denied each of the motions, and the movants filed timely notices of appeal to the Commission. *See* 18 C.F.R. § 1.28 (January 1, 1971). Although each appeal was denied *sub silentio* by operation of law,[13] the Commission granted rehearings and by orders dated October 28 and 29, 1971, it formally denied the appeals. Petitioners ask us to review those orders. *See* Federal Power Act § 313, 16 U.S.C. § 825*l*.

Before passing to the merits of petitioners' contentions, we note that the latest round of hearings commenced on November 9, 1971. Petitioners moved for a stay of these hearings in this Court, but the motion was denied on November 1. To date, the hearings have been concerned with cross-examination of PASNY and Commission witnesses. They are expected to continue for several months. In addition, the

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turn had made it difficult procedurally for the intervenors. For example, intervenors were forced to go to court to compel disclosures under the Freedom of Information Act. *See Town of Durham* v. *Federal Power Commission*, 71 Civ. 3993 (S.D.N.Y. Oct. 26, 1971). We suggest that the Federal Power Commission, as well as other Federal Agencies, must review their rules and rethink encrusted, entrenched positions in light of the provision in NEPA that, "to the fullest extent possible," all regulations of the agencies must be interpreted and administered in accordance with the policies of the Act. NEPA § 102(1), 42 U.S.C.A. § 4332(1). We fully agree with the Council on Environmental Quality that compliance is required not only with the letter, but the spirit of the Act. Council on Environmental Quality, Guidelines § 1, 36 Fed Reg. 7724 (April 23, 1971).

[13] Section 1.28(c) of the Commission's rules provides in part:

"(c) *Commission action.* Unless the Commission acts upon questions referred by presiding officers to the Commission for determination or upon appeals taken to the Commission from rulings of presiding officers within thirty days after referral or filing of the appeal, whichever is later, such referrals or appeals shall be deemed to have been denied."

entire project, exclusive of the Gilboa-Leeds transmission line, is now more than 80% complete.[14]

4. COMPLIANCE WITH NEPA

A. Gilboa-Leeds Transmission Line

Section 102(2)(C) of NEPA, as we stated at the outset, requires every federal agency to "include in every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment" a detailed environmental impact statement. Prior to making the statement, the agency must "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." The detailed statement, however, "*must accompany the proposal through the existing agency review processes.* * * *"[15] (Emphasis added.)

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[14] We are told that more than 75% of the estimated $160,000,000 total cost has been spent or committed.

[15] Section 102(2)(C) provides in full:

"SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall—

* * * * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action.

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

"(iii) alternatives to the proposed action.

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of re-

It is conceded that authorization of the Gilboa-Leeds line, an integral part of the Blenheim-Gilboa Project, would constitute a major federal action. The parties, however, are in vigorous disagreement over when the Commission must make its impact statement. The Commission argues that PASNY's statement, reviewed as to form by the Commission and circulated by it, suffices for the purposes of Section 102(2)(C) and that the Commission is not required to make its *own* statement until it files its final decision. Petitioners argue that the Commission must issue its statement prior to any formal hearings. PASNY, perhaps recognizing that the Commission's position is untenable, but nevertheless anxious to expedite the proceedings, proposes a third course of action. It urges that the Commission can draft its statement on the basis of the hearings, but to be circulated by it for comment before its final decision. It is clear to us that petitioners offer the correct interpretation.

Section 101(a) of NEPA, 42 U.S.C.A. § 4331(a), declares that "it is the continuing policy of the Federal Government * * * to use all practicable

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sources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;"

means and measures * * * in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." To this end the government must "coordinate Federal plans, functions, programs, and resources. * * *" NEPA § 101 (b), 42 U.S.C.A. § 4331(b). As long as six years ago, this Court remanded a case to the Commission because, in granting a license for the construction of a similar pumped storage power project at Storm King Mountain on the Hudson River it had failed to weigh the factors of "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites." [16] *Scenic Hudson Preservation Conference* v. *Federal Power Commission* [*Scenic Hudson I*], 354 F. 2d 608, 614 (165), *cert. denied sub nom. Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

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[16] The decision was based upon Section 10(a) of the Federal Power Act, 16 U.S.C. § 803, which provides:

"All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

See also Udall v. *Federal Power Commission*, 387 U.S. 428 (1967).

We commented there: "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it: the right of the public must receive active and affirmative protection at the hands of the Commission." *Id.* at 620. But NEPA, which was a response to the urgent need for a similar approach in all federal agencies,[17] went far beyond the requirement that the agency merely consider environmental factors and include those factors in the record subject to review by the courts.

In addition to the environmental impact statement, Section 102(2) requires the agency, *inter alia*, to:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> * * * * *
>
> (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
>
> * * * * *
>
> (E) recognize the worldwide and long-range character of environmental problems * * *.

We view this section as did the District of Columbia Circuit. It is a mandate to consider environmental values "at every distinctive and comprehensive stage of the [agency's] process." The primary and nondelegable responsibility for fulfilling that function lies with the Commission. *Calvert Cliffs' Coordinat-*

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[17] *See* Hanks & Hanks, *supra* note 3, at 265–69.

ing Committee, Inc. v. Atomic Energy Commission, 449 F. 2d 1109, 1119 (D.C. Cir. 1971) (holding that rules of the AEC which did not require a detailed statement in an uncontested licensing proceeding did not comply with Section 102(2)(C)).

The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire.[18] The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.[19] In fact, PASNY's statement begins: "Neither the construction nor the operation of the Gilboa-Leeds transmission line will have any significant adverse impact on the environment." But, the Gilboa-Leeds line, if constructed as proposed, will cut a swath approximately 35 miles long and 150 feet wide across the face of Greene and Schoharie Counties. It is small consolation that the line will not scar either existing historical sites or designated park land.

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[18] The Commission did not face squarely the issue of compliance with NEPA in its orders. In upholding the Presiding Examiner's refusal to delay the hearings until the Commission had prepared its statement, the Commission said:

"* * * they [Durham and Greene County] simply ask the Commission to reconsider that which the Presiding Examiner found to be not in the public interest. For the reasons given in connection with the preceding appeal [the Presiding Examiner has broad discretion over hearing procedures], reconsideration of such procedural matter will be denied * * *."

[19] *Cf. Scenic Hudson I*, 354 F. 2d at 619: "self-serving general statements by officials of Consolidated Edison * * *."

Moreover, although decisions like *Scenic Hudson I* have greatly expanded the concept of standing to challenge administrative action,[20] intervenors generally have limited resources, both in terms of money and technical expertise, and thus may not be able to provide an effective analysis of environmental factors.[21] It was in part for this reason that Congress has compelled agencies to seek the aid of all available expertise and formulate their own position early in the review process. The Commission argues, however, that written testimony of its staff demonstrates that the Commission has not left the applicant and the intervenors to develop the record. It insists that its staff has undertaken field research in an effort to investigate alternatives proposed by PASNY and also any additional feasible alternatives. It is clear to us that this testimony cannot replace a single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes. If this course of action we approve were not followed, alternatives might be lost as the applicant's statement tended to produce a *status quo* syndrome.

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[20] *See, e.g., Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970); *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97 (2d Cir.), *cert denied*, 400 U.S. 949 (1970). *See generally* Hanks & Hanks, *supra* note 3, at 231–44; Peterson, *supra* note 3, at 50047–48.

[21] *See Calvert Cliffs'*, 449 F. 2d at 1118–19 ("It is, moreover, unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignores environmental costs."); Gellhorn, *Public Participation in Administrative Hearings*, Report Prepared for the Committee on Agency Organization and Procedure of the Administrative Conference of the United States 29–37 (October 29, 1971).

The danger that the review process will bog down once an initial decision has been rendered is fully recognized by the Council on Environmental Quality [22] in Section 10(b) of its Guidelines suggesting procedures for compliance with NEPA, 36 Fed. Reg. 7724 (April 23, 1971):

> "It is important that draft environmental statements be prepared and circulated for comment and furnished to the Council early enough in the agency review process before an action is taken in order to permit meaningful consideration of the environmental issues involved. To the maximum extent practicable no administrative action * * * is to be taken sooner than ninety (90) days after a draft environmental statement has been circulated for comment, furnished to the Council and * * * made available to the public * * *.

It is interesting that the Commission relies on these Guidelines to sustain its position. Initially, it directs us to Section 7 which would allow an agency, when it seeks the advice of other agencies pursuant to Section 102(2)(C), to circulate "(i) a draft environmental statement for which it takes responsibility or (ii) comparable information * * *." And, Section 2.81 (b) of the Commission's latest rules (issued after the Guidelines) provides that the applicant's draft statement "shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental

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[22] The Council was established pursuant to Subchapter II of NEPA, 42 U.S.C. §§ 4341 *et seq.* Its duties include assisting the President in the preparation of the annual Environmental Quality Report to be transmitted to Congress and conducting investigations and developing programs concerning environmental quality.

Quality." The Commission then calls our attention to Section 10(e) of the Guidelines, which provides:

> Agencies which hold hearings on proposed administrative actions or legislation should make the draft environmental statement available to the public at least fifteen (15) days prior to the time of the relevant hearings except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate public notice and information to identify the issues and obtain the comments provided for in sections 6–9 of these guidelines.

The Commission argues that the proviso relieves it of its obligation to prepare an environmental statement prior to the licensing hearings and that the applicant's statement, "information comparable" to a statement of its own, sufficiently identifies the issues. Although the Guidelines are merely advisory and the Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA, we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies "to foster and promote the improvement of the environmental quality," NEPA § 204, 42 U.S.C.A. § 4344, has misconstrued NEPA. Although the Commission's interpretation of Section 10(e) of the Guidelines is superficially appealing, it flies in the face of Section 102(2)(C) of NEPA which explicitly requires the agency's *own* detailed statement to "accompany the proposal through the existing agency review processes." [23] There

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[23] An alternative interpretation, and one we would deem acceptable under the Act, is that the agency may hold two hearings—one solely to gather information to aid the Com-

can be no question that the hearings on PASNY's application, ordered pursuant to Section 308 of the Federal Power Act, 16 U.S.C. § 825g, and Section 1.20 of the Commission's rules, 18 C.F.R. § 1.20 (January 1, 1971), constitute an existing agency review process.

Though we conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by *its staff* of its own impact statement,[21] we are of the view that it did not seek improperly the advice of other agencies on the basis of PASNY's application. Section 102(2)(C) compels

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mission in formulating its statements, the second to consider the merits of the license application.

It is interesting to note that the Council on Environmental Quality assumed that when the Commission circulated the PASNY report, it subsequently would circulate its own report. In its June 1971 official monthly bulletin the Council published the following notice of the PASNY report:

"Applicant's drafts. (These are not official FPC drafts. They will be followed by staff-prepared draft statements.) * * *"

[21] In its brief to this Court, the Commission argued that it would be in contravention of Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557, which prohibits Commission participation in the decisionmaking process until the record is completely developed, if it were required to adopt a position in an environmental impact statement. Certainly no one has suggested that the detailed statement prepared before the hearings must be prepared by the Commission members. It is sufficient for the purposes of NEPA if the statement is prepared by the Commission's staff on the basis of the staff's investigations. Counsel for the Commission conceded at oral argument that this procedure would not violate the APA. *See also* Section 6(d) of the Guidelines of the Council on Environmental Quality:

"Where an agency follows a practice of declining to favor an alternative until public hearings have been held on a proposed action, a draft environmental statement may be prepared and circulated indicating that two or more alternatives are under consideration."

the agency to seek this advice before preparing its statement. Section 102(1), however, directs that "to the fullest extent possible" regulations should be interpreted and administered in accordance with the policies of NEPA. In this regard, it would be instructive for the Commission to consult the rules of the Atomic Energy Commission, 36 Fed. Reg. 18071 (Sept. 9, 1971), promulgated after the decision in *Calvert Cliffs'* charged the AEC with a "crabbed interpretation of NEPA [which made] a mockery of the Act." 449 F. 2d at 117. The Atomic Energy Commission, although it still requires an applicant to submit its environmental report, prepares a draft report of its own in advance of seeking the advice of other federal agencies. Then, on the basis of comments received from these agencies and all interested parties, it prepares its final detailed statement, which is offered in evidence at a contested hearing.

In light of our foregoing discussion, we must consider the most efficient procedure for ensuring that the policies of NEPA are implemented in Commission proceedings on the Gilboa-Leeds line. For the reasons we have set forth, we deem it essential that the Commission's staff should prepare a detailed statement before the Presiding Examiner issues his initial decision. Moreover, the intervenors must have a reasonable opportunity to comment on the statement. But, since the statement may well go to waste unless it is subject to the full scrutiny of the hearing process, we also believe that the intervenors must be given the opportunity to cross-examine both PASNY and Commission witnesses in light of the statement. "Often individuals and groups can contribute data and insights beyond the expertise of the agency involved." *CEQ Report*, 1 Environmental L. Rep. at 50059. We leave to the Commission to determine the most efficient procedure for meeting this mandate.

Fully recognizing that delay unfortunately is incident to our mandate and PASNY's claim that the Blenheim-Gilboa project is a vitally needed power facility, we can only add our voice to that of the District of Columbia Circuit in *Calvert Cliffs'*: Delay is a concomitant of the implementation of the procedures prescribed by NEPA, and the spectre of a power crisis "must not be used to create a blackout of environmental consideration in the agency review process." 449 F. 2d at 1122. "It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible." *Id.* at 1128.

The petitioners inform us also that the Commission has violated its comprehensive planning duties by not requiring PASNY to divulge in its environmental statement any plans it may have with respect to future power projects and transmission lines. PASNY has admitted that the Gilboa-Leeds line is part of a plan which may include three massive pumped storage hydroelectric projects, six 345 kilovolt transmission lines and three 765 kilovolt transmission lines. The Commission responds that its planning responsibility under Section 10(a) of the Federal Power Act, 16 U.S.C. §803(a),[25] does not require analysis of future projects which are not presented in license applications. PASNY adopts the benign position that it has disclosed the feasibility studies presently in progress[26] and that the Commission should take them into account in considering the Gilboa-Leeds line.

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[25] *See* note 16 *supra*.

[26] PASNY is making a study to determine the physical, environmental and economic feasibility of constructing additional pumped storage facilities downstream from the Blenheim-Gilboa project.

We cannot agree with petitioners that the Commission erred when it did not require PASNY to supplement its impact statement. NEPA places the onus of formulating the statement solely on the Commission, and unless there is any indication that the Commission's procedures will not allow it to comply with its statutory duty this Court should defer to the Commission's discretion as to the proper information gathering techniques.

In an effort to avoid any confusion or misunderstanding on remand, we are constrained to comment on the Commission's planning responsibility. Under Section 10(a) of the Federal Power Act, the Commission cannot issue a license unless the project is "best adapted to a comprehensive plan * * * for the improvement and utilization of waterpower development and for other beneficial public uses, including recreational purposes; * * *" In *Scenic Hudson I* we commented that the Commission's failure to inform itself of Consolidated Edison's future interconnection plans "cannot be reconciled with its planning responsibility under the Federal Power Act." 354 F. 2d at 622. And, less than two years later, Justice Douglas writing for the Supreme Court in *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), made it clear that the Federal Power Act does not command the immediate construction of as many projects as possible and that the determination whether to license any one project "can be made only after an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, [and] the public interest in preserving reaches of wild rivers and wilderness areas. * * *" *Id.* at 450. Although these decisions may not have

established long-range planning requirements,[*] they evidence a clear intent that the Commission at least should consider all available and relevant information in performing its functions.

The Commission's "hands-off" attitude is even more startling in view of the explicit requirement in NEPA that the Commission "recognize the worldwide and longrange character of environmental problems" and interpret its mandate under the Federal Power Act in accordance with the policies set forth in NEPA. NEPA §§ 102(1), (2)(E), 42 U.S.C.A. §§ 4332(1), (2)(E). Any doubt about the intent of these provisions is obviated by the following statement in the Senate Report accompanying the Act:

"Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

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[*] The author of this opinion has suggested that:

"* * * a major share of the blame for the unnecessary delays and ineffectual public planning in the United States may be laid at the doorstep of fragmented government regulation of power development. We sorely lack a federal agency—with sufficient authority, power and purse to choose among the infinite patterns of potential development—responsible for planning and controlling the growth and dispersal of electric generating capacity over a realistically extensive span of space and time."

Kaufman, *Power for the People—and by the People: Utilities, the Environment and the Public Interest*, 46 N.Y.U.L. Rev. 867, 872-73 (1971).

The Commission has indicated that the June 6, 1969, license of the Blenheim-Gilboa Project did not commit it to authorize construction of the Gilboa-Leeds Line. But we fail to see how the Commission, if it is to fulfill the demanding standard of "careful and informed decisionmaking," *Calvert Cliffs'*, 449 F. 2d at 1115, can disregard impending plans for further power development. For example, it may be that it would be proper to defer decision on the Gilboa-Leeds line until these plans were crystallized, particularly if there is a likelihood that future development might affect the optimum location of the line or even make the line unnecessary. Although the basic defect of current planning and licensing processes is "the inevitably narrow scope of the decision the agency [has] to make: whether or not to license a single and specific,"[28] we cannot tolerate the Commission cutting back on its expanded responsibility by blinding itself to potential developments notwithstanding its lack of authority to compel future, alternate construction.

B. Blenheim-Gilboa Project and Approved Transmission Lines

Petitioners ask us to stay construction of the pumped storage facility and the two approved transmission lines, now 80% complete, pending compliance with NEPA.[29] Although there can be no question that the Act applies to all major federal actions taken after January 1, 1970, despite the fact that construc-

[28] *Id.* at 872.

[29] Petitioners before the Commission also challenged the license and the approval of the Gilboa-New Scotland and Gilboa-Fraser lines on the ground that the Commission did not comply with the notice provisions of the Federal Power Act, and the lengthy order of October 28, 1971, deals solely with that point. Petitioners have not raised the objection here.

tion of the project under consideration may have commenced prior to that date, *see, e.g., Calvert Cliffs'*, 449 F. 2d at 1127–29 (construction permit for nuclear facility granted prior to effective date, but operating license not yet issued); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 728, 743–49 (E.D. Ark. 1971) (Gillham Dam to be built as part of on-going Millwood Reservoir project), we see no basis for applying NEPA retroactively [30] to the licensing of the basic project which became final nearly six months prior to the effective date of the Act. *See Pennsylvania Environmental Council* v. *Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

With respect to the Gilboa-New Scotland and Gilboa-Fraser lines, however, there can be no question that the Commission failed to comply with NEPA. The lines were approved on April 10, 1970, but the Commission failed to issue the requisite detailed environmental statement. Nevertheless, we find no compelling basis for halting construction of the lines so far advanced and decline to reopen the authorization proceedings. It is of no small consequence that petitioners, having made timely motions to intervene, offered no objections to the construction of the two lines and did not petition this Court or the District of Columbia for review within 60 days as provided by Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b). Thus, construction of the lines began pursuant to a *final* order of the Commission. Although we might arrive at a different conclusion if there were significant potential for subversion of the substantive policies expressed in NEPA, *cf. Calvert Cliffs'*, 449 F. 2d at 1121 n. 28, the Commission did require PASNY in submitting its plans to "give appropriate

[30] *See generally* Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 Mich. L. Rev. 732 (1971).

consideration to recognized guidelines for protecting the environment"[31] and also conducted its own independent investigation of alternative routings. Moreover, it would be unreasonable to expect instant compliance with all of the Act's procedural requirements, *see id.* at 1121, and there is no indication (as there is with respect to the Gilboa-Leeds line) of obstinate refusal to comply with NEPA. *Compare Scenic Hudson Preservation Conference* v. *Federal Power Commission* [*Scenic Hudson II*], 1970 Slip Op. 5279, 5314-16 (2d Cir. Oct. 22, 1971).

II. EXPENSES AND FEES

The petitioners' final request is for an order requiring PASNY, or in the alternative the Commission, to pay the expenses and fees incurred by petitioners. Recognizing as they do that a rule requiring reimbursement of all intervenors would be subject to abuse, they limit their request to reasonable out-of-pocket expenses, including fees for experts as they are incurred, and reasonable attorneys' fees at the conclusion of the proceedings before the Commission in the event that their participation is determined to have been in the public interest.

As we read the Commission's order of October 29, 1971, the Commission denied petitioners' motion for payment of fees on the ground that it had no authority to grant them. But, in an effort to buttress its argument that the petitions for review are in this re-

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[31] *See, e.g.*, Guidelines for the Protection of Natural, Historic, Scenic, and Recreational Values in the Design and Location of Rights-of-Way and Transmission Facilities, Report of the Working Committee on Utilities of the President's Council on Recreation and Natural Beauty (Dec. 27, 1968), reprinted in Commissioner Bagge's concurrence in the June 6, 1969, license, 41 F.P.C. at 735.

gard untimely, the Commission now argues that it has foreclosed only the present award of fees and has left open the question of whether ultimately to award them when the proceedings have come to an end. Whether or not the Commission will entertain renewed motions at the close of its proceedings, we find that the petitions are timely and that this Court has jurisdiction to review the Commission's order.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides that "[a]ny party to a proceeding under [the Act] aggrieved by an order issued by the Commission in such proceedings may obtain a review of such order * * *." This language, unlike those provisions limiting review to "final orders," *see, e.g.*, Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), seemingly would allow review of all Commission orders. But the courts, sensitive to the policies underlying the requirement of exhaustion of administrative remedies, have declined jurisdiction where the issues raised could be disposed of in review of a final Commission order without serious detriment to the rights of the parties. *See, e.g., Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383–84 (1938); *Mid-American Pipeline Co.* v. *Federal Power Commission*, 299 F. 2d 126 (D.C. Cir. 1962). Review is available, however, where an interlocutory order has "an impact upon rights and [is] of such a nature as will cause irreparable injury if not challenged." *Amerada Petroleum Corp.* v. *Federal Power Commission*, 285 F. 2d 737, 739 (10th Cir. 1960) (interpreting the review provision of the Natural Gas Act, identical to Section 313 (b) of the Federal Power Act). In *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F. 2d 584 (D.C. Cir. 1971), the District of Columbia Circuit, considering the Federal Insecticide, Fungicide, and

Rodenticide Act, which provides for judicial review "[i]n a case of actual controversy as to the validity of any order" of the Secretary of Agriculture, stated that the applicable test is not whether there are further administrative proceedings available, but "whether the impact of the order is sufficiently 'final' to warrant review in the context of the particular case." *Id.* at 391. *See also Environmental Defense Fund, Inc. v. Hardin*, 428 F. 2d 1093, 1098–99 (D.C. Cir. 1970). In light of the new congressional mandates in NEPA, this test is particularly appropriate when agency action affects the environment.

In accordance with these precepts we find that the petitions are reviewable. Despite the Commission's argument that petitioners have made an inadequate showing of financial hardship, it is clear to us that a refusal to award petitioners expenses as they are incurred, particularly expenses related to production of expert witnesses, may significantly hamper a petitioner's efforts to represent the public interest before the Commission.[22] And, a retroactive award of experts' fees would be small consolation to a petitioner if the hearings are finished, the record is complete and these experts were not called because of inadequate funds.

Having determined that the petition for review is timely, we find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clear congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings.

Petitioners rely on two provisions of the Federal Power Act—Sections 309 and 314(c), 16 U.S.C. §§ 825h, 825m(c)—and buttress their interpretations

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[22] *See* page 1408 & note 21 *supra*.

of those sections with the mandate in Section 102(1) of NEPA that all public laws, "to the fullest extent possible," should be interpreted in accordance with national environmental policies. Section 309 empowers the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the Federal Power Act]." Although this section, which carries the title "Administrative powers of Commission; rules, regulations, and orders," is not restricted to "procedural minutiae," *Niagara Mohawk Power Corporation* v. *Federal Power Commission*, 379 F. 2d 153, 158 (D.C. Cir. 1967) (FPC empowered to backdate a license), we perceive no basis in the terms of the provision to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them when to do so was in the public interest. See Clayton Act, 15 U.S.C. § 15; Communications Act of 1934, 47 U.S.C. § 206; Interstate Commerce Act, 49 U.S.C. § 16(2).

Nor is there any basis for reaching a different conclusion with respect to counsel fees under Section 314(c) of the Federal Power Act. It provides that "[t]he Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission * * * ." The legislative history bears out the only reasonable interpretation so clear on the face of the statute: "Subsection (c) authorizes the Commission to employ such attorneys as it needs for *its* legal work." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 34 (emphasis added.).

Finally, petitioners rely on the Supreme Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), which held that plaintiffs who successfully brought a derivative action under Section 14(a) of the Securities Exchange Act of 1934 were entitled to an award of costs, including counsel fees, against the corporation, even if the corporation recovered no money as a result of the action. Noting that the Securities Exchange Act did not provide for counsel fees, the Court based its decision on its equitable power to enforce the policies of the Act and to prevent unjust enrichment: "The dissemination of misleading proxy solicitations was a 'deceit practiced on the stockholders as a group,' *J. I. Case Co.* v. *Borak*, 377 U.S. at 432, and the expenses of petitioner's lawsuit have been incurred for the benefit of the corporation and the other shareholders." 396 U.S. at 392. Whether or not *Mills* could support such an award as petitioners seek without a more specific congressional mandate,[33] we do not find compelling need for it at this point, in view of our direction as to the role required of the Commission here.

Fully mindful that petitioners invoke our equitable powers, we cannot ignore parallel developments in this rapidly changing area of administrative law. As recently as December 7, 1971, the Administrative Conference of the United States refused to adopt a recommendation which would have endorsed the principle of reimbursing the legal expenses incurred by intervenors in administrative proceedings. The Conference, however, did adopt a recommendation which would oblige agencies to minimize filing and distribution requirements, to minimize the costs of obtaining

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[33] *See* Note, *The Allocation of Attorneys Fees after Mills* v. *Electric Auto-Lite*, 38 U. Chi. L. Rev. 316, 329–30 (1971).

transcripts, to make available the agency's technical files and to experiment with allowing access to their staff as advisers and witnesses. Recommendation 28, Public Participation in Administrative Hearings § D, adopted December 7, 1971. Without a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules.

The petitions for review are granted in part and denied in part, and the case is remanded for further proceedings in accordance with this opinion.

APPENDIX B

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of January, one thousand nine hundred and seventy-two.

Present: Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. William H. Mulligan, *Circuit Judges.*

Greene County Planning Board, petitioner

v.

Federal Power Commission, respondent

Town of Durham, New York and Association for the Preservation of Durham Valley, Power Authority of the State of New York, The Sierra Club, intervenors

Petitions for review of orders of the Federal Power Commission.

This cause came on to be heard on the administrative record of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the said petitions be and they hereby are granted in part and denied in part and that the actions be and they hereby are remanded to said Federal Power Commission for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk.

APPENDIX C

71–1991 & 71–1196

United States Court of Appeals for the Second Circuit

GREENE COUNTY PLANNING BOARD, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, INTERVENORS

A petition for a rehearing having been filed herein by the Federal Power Commission,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. JOSEPH SMITH,
IRVING R. KAUFFMAN,
WILLIAM H. MULLIGAN.

MARCH 10, 1972.

71–1991 & 71–1196

United States Court of Appeals, Second Circuit

GREENE COUNTY PLANNING BOARD, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, INTERVENORS

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Federal Power Commission and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY,
Chief Judge.

MARCH 10, 1972.

APPENDIX D

United States of America, Federal Power Commission

(18 CFR 2.80, 2.81, 2.82, and 4.41)

Before Commissioners: JOHN N. NASSIKAS, *Chairman;* JOHN A. CARVER, JR., ALBERT B. BROOKE, JR., and PINKNEY WALKER.

IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Docket No. R–398

Order No. 415–B

Order amending sections 2.80, 2.81, 2.82, of the General Rules and section 4.41 of the regulations under the Federal Power Act

(Issued November 19, 1971)

On December 4, 1970, the Commission issued Order No. 415 (35 F.R. 18958, December 15, 1970) which prescribed §§ 2.80–2.82 of its General Policy and Interpretations (18 CFR 2.80–2.82) and various related amendments to the Commission's Regulations under the Federal Power and Natural Gas Acts. On April 13, 1971, the Commission issued its Order No. 415–A (36 F.R. 7232, April 16, 1971) further clarifying the procedures in § 2.81 and § 2.82. Experience in applying these Regulations, as amended, and the Final Guidelines of the Council on Environmental Quality (36 F.R. 7724) demonstrated the desirability of once again

proposing revisions to the Commission's Regulations for Implementation of the National Environmental Policy Act of 1969 (83 Stat. 852).

Accordingly, on July 7, 1971, (36 F.R. 13040, July 13, 1971) the Commission issued a notice of proposed rulemaking to amend §§ 2.80–2.82 of its "Statement of General Policy to Implement Procedures for Compliance with the National Environmental Policy Act of 1969", and § 4.41 of the Commission's Regulations under the Federal Power Act. All interested persons were invited to submit comments for consideration in connection with the proposed amendments on or before August 9, 1971. A total of twelve comments were received.[1]

Many of the comments received were objections to Order No. 415 and not to the changes proposed in our July 7, 1971, notice.

Several comments expressed concern that the time limitations specified in the proposed § 2.80(c)(i)[2] would unduly delay procedures. This provision was

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[1] Timely comments filed on or before August 9, 1971 were submitted by: Columbia Gas System Service Corporation; Consolidated Edison Company of New York, Inc.; Edison Electric Institute; Kafin and Needleman; Chris C. Oynes; Pacific Gas and Electric Company; Pennsylvania Power & Light Company; Phillips Petroleum Company; Southern California Edison Company; and Southern Natural Gas Company.

Late filings were made by Virginia Electric and Power Company (filed August 11, 1971); and the Northern Natural Gas Company (filed August 23, 1971).

We have considered all the filings made in this docket.

[2] The proposed § 2.80(c)(i) stated:

"To the maximum extent practicable no administrative action is to be taken sooner than ninety days after a draft environmental statement has been circulated for comment and thirty days after the final text of our environmental statement has been made available to the Council on Environmental Quality and the public."

added as a result of the recommendation contained in paragraph 10(b) of the Guidelines of the Council on Environmental Quality. It should be pointed out that these Guidelines are advisory. Our rulemaking procedures for compliance with the National Environmental Policy Act are subject to the provisions of the Administrative Procedure Act and must meet its requirements. Accordingly, after careful consideration, the Commission has determined that no significant delay need result from this limitation. However, for purposes of clarification, it is ordered that § 2.80(c)(i) be changed to read as follows:

> (c)(i) Except as authorized by the Commission no action to construct a facility licensed or certificated by Commission is to be taken sooner than ninety days after a draft environmental statement has been circulated for comment or thirty days after the final text of an environmental statement has been made available to the Council on Environmental Quality and the public.

Section 2.81(b) as promulgated, in Order 415, issued December 4, 1970 (35 F.R. 18958) requires each applicant as described in § 2.81(a) to submit a detailed statement of environmental factors along with its application. The Commission, in order to assist other government agencies and other interested parties in complying with the provisions of § 4(e) of the Federal Power Act (41 Stat. 1065–1066; 49 Stat. 840–841; 61 Stat. 501; 16 U.S.C. 797(e) and § 102(2)(C) of the National Environmental Policy Act (83 Stat. 853) and to facilitate publication of legal notices, has determined that it is desirable to make the applicant's environmental impact statement a self-contained exhibit to the application.

One comment expressed the concern that amending the Commission's Regulations so as to have § 4.41 specify a new Exhibit W (the applicant's environmental impact statement) will involve unnecessary duplication of information required both in certain exhibits [3] to the application and the applicant's environmental impact statement. It should be pointed out that Exhibit W must be "self-contained". The applicant, if it so desires, is free to incorporate by reference in the environmental impact statement information required by other exhibits provided that such exhibits or pertinent extracts therefrom are attached to the environmental impact statement.

Since the promulgation of Order No. 415 the Commission has sent all § 102(2)(C) referrals to the Environmental Protection Agency. However, §§ 2.81 and 2.82 of Part 2, Subchapter A of 18 CFR have not explicitly designated the Environmental Protection Agency and the Commission, through experience in applying these provisions, has determined that it is desirable that government agencies submitting these referrals provide the applicant and the other parties to the proceeding with a copy. Therefore, the Commission is amending the relevant portions of those sections by specifically naming the Environmental Protection Agency, the applicant, and the other parties to the proceeding.

The final guidelines of the Council on Environmental Quality recommend that "wherever an agency action related to air or water quality * * * or other provisions of the authority of the Administrator * * *" [of the Environmental Protection Agency

[3] Exhibit H requires a complete study of the hydrological effect of project operation; Exhibit S requires a complete study of the effect on fish and wildlife of project operation.

(EPA)] the Administrator shall be allowed 45 days to make his § 102(2)(C) comment. It is felt that there is no reason to allow EPA 45 days for their comments while limiting all other parties to a 30-day period. Therefore we have adopted a 45-day period in lieu of our earlier 30-day period for EPA and all others wishing to submit comments.

The purpose of the changes in §§ 2.81(b) and 2.82(b) is to clarify our procedures in regard to the preparation and circulation of environmental statements. For purposes of circulation for comment as required by § 102(2)(C) of the National Environmental Policy Act, the applicant's statement, as modified by § 2.81(b) and § 2.82(b), will serve as the agency draft statement, in accord with the recommendations of the Council on Environmental Quality in Section 7 of the Guidelines. Again, it should be pointed out that these Guidelines are recommendations, and that our procedures are governed by the Administrative Procedure Act. The procedures herein prescribed are more comprehensive than those recommended in the Guidelines.

This statement, with its attendant comments, will serve to delineate the issues upon which environmental evidence will be presented at the hearing. This will, of course, subject the initial statement to considerable analysis and possibly modification by the staff and all other parties, both during hearing and, after the environmental evidence has been fully developed, at the briefing stage.

We have decided that each applicant for a certificate within the scope of § 2.82(a) shall file an environmental statement as a part of its application. By this order we are deleting the abbreviated procedures pre-

viously available under § 2.82(b). Accordingly §§ 2.81 (b) and 2.82(b) are amended to read as follows:

2.81(b) All applications covered by paragraph (a) of this section shall be accompanied by Exhibit W, the applicant's detailed statement of the environmental factors specified in § 2.80 and § 4.41. The staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears, based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.81, the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

2.82(b) All applications covered by paragraph (a) of this section shall be accompanied by the applicant's detailed statement of the environmental factors specified in § 2.80. The staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears,

based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.82, the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested, supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

Wording in §§ 2.81(c) and 2.82(c) has been changed to reflect the changes in §§ 2.81(b) and 2.82(b). In addition, in order to clarify the status of the comments of the Environmental Protection Agency and the Council on Environmental Quality, the final sentence of §§ 2.81(c) and 2.82(c) is transferred to the final sentences of §§ 2.81(c) and 2.82(c). Accordingly, §§ 2.81(c) and 2.28(c) are modified to read as follows:

All interveners taking a position on environmental matters shall file comments on the draft statement with the Commission including an explanation of their environmental position, specifying any differences with the applicant's detailed statement upon which intervener wishes to be heard and including therein a discussion of that position in the context of the factors

enumerated in § 2.80, at a time specified by the Commission or the Presiding Examiner. All interveners shall be responsible for filing ten copies of their filing with the Council on Environmental Quality and at least one copy with the Environmental Protection Agency at the time they file with the Commission and shall also supply a copy of such filing to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The comments of the Council on Environmental Quality, and the Environmental Protection Agency, if any, should be made in a written statement served upon the Commission's Secretary and all parties of record.

To further carry out our procedural implementation of the National Environmental Policy Act, to bring uniformity to our procedures, and to assure equal and adequate environmental consideration of all applications filed pursuant to §§ 2.81 and 2.82 of part 2, Subchapter A of 18 CFR, the separate procedures set forth in §§ 2.81(f) and 2.82(f) for handling noncontested cases are hereby deleted. Henceforth all cases described above will be handled in the same manner.

Sections 2.81(g) and 2.82(g) are redesignated as §§ 2.81(f) and 2.82(f).

The Commission finds:

(1) The revisions to the statement of policy herein adopted result from review and consideration of the comments and suggestions received in response to the notice of proposed rulemaking issued July 7, 1971. However, these revisions differ in some respects from those proposed in that notice. In view of the great importance and urgency of environmental problems, it is essential that the Commission promulgate these

procedures respecting environmental statements at this time. For the foregoing reasons, further compliance with the notice, public procedure and effective date provisions of 5 U.S.C. is impracticable and contrary to the public interest and good cause exists that the Commission adopt the revisions to the statement of policy set out in this order without further notice and public procedure and that the revisions herein adopted become effective upon the issuance of this order.

(2) The amendments to the Commission's General Rules and Regulations under the Federal Power Act adopted herein are necessary and appropriate for carrying out the provisions of the Federal Power Act, the Natural Gas Act, and the National Environmental Policy Act;

(3) Good cause exists that the amendments herein adopted become effective upon the issuance of this order.

The Commission acting pursuant to the provisions of the Federal Power Act, particularly sections 4, 10, 15, 307, 309, 311 and 312 (41 Stat. 1065, 1066, 1068, 1069, 1070, 1072; 46 Stat. 798, 49 Stat. 839, 840, 841, 842, 843, 844, 856, 857, 858, 859, 860, 61 Stat. 501, 82 Stat. 617; 16 U.S.C. 797, 803, 808, 825f, 825h, 825j, 825k), and the Natural Gas Act, particularly sections 7 and 16 (52 Stat. 824, 825, 830, 56 Stat. 83, 84; 61 Stat. 459; 15 U.S.C. 717f, 717o), and the National Environmental Policy Act of 1969, P.L. 91–190, approved January 1, 1970, particularly sections 102 and 103 (83 Stat. 853, 854) orders:

(A) The Statements of General Policy to implement procedures for compliance with the National Environmental Policy Act of 1969 in Part 2—General Policy and Interpretations is revised to read as follows:

STATEMENT OF GENERAL POLICY TO IMPLEMENT PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

§ 2.80 *Detailed Environmental Statement.*

(a) It shall be the general policy of the Federal Power Commission to adopt and to adhere to the objectives and aims of the National Environmental Policy Act of 1969 (Act) in its regulation under the Federal Power Act and the Natural Gas Act. The National Environmental Policy Act of 1969 requires, among other things, a detailed environmental statement in all major Federal actions and in all reports and recommendations on environmental legislative proposals which will significantly affect the quality of the human environment.

(b) Therefore, in compliance with the National Environmental Policy Act of 1969 we will make a detailed environmental statement when the regulatory action taken by us under the Federal Power Act and Natural Gas Act will have such significant environmental impact. A "detailed statement" prepared in compliance with the requirements of §§ 2.81 through 2.82 of this Part shall fully develop the five factors listed hereinafter in the context, among other relevant environmental factors, of such considerations as the proposed activity's direct and indirect effect on the ecology of the land, air and water environment of the project or natural gas pipeline facility, and on aquatic and wildlife, and established park and recreational areas, on sites of natural, historic, and scenic values and resources of the area, on secondary significant environmental effects of the proposed activity and the conformity of the proposed activity with all applicable environmental standards. Such statement should also deal with the alternatives as compared with the proposal. The above factors are listed to merely illustrate the kinds of values that must be considered in

the statement; in no respect is this listing to be construed as covering all relevant factors.

(1) the environmental impact of the proposed action,

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(3) alternatives to the proposed action,

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(c)(i) Except as authorized by the Commission no action to construct a facility licensed or certificated by the Commission is to be taken sooner than ninety days after a draft environmental statement has been circulated for comment or thirty days after the final text of an environmental statement has been made available to the Council on Environmental Quality and the public.

(c)(ii) Upon a finding that it is necessary and appropriate in the public interest the Commission may dispense with any time period specified in §§ 2.80–2.82.

§ 2.81 *Compliance With the National Environmental Policy Act of 1969 Under Part I of the Federal Power Act.*

(a) A notice of all applications for major projects (those in excess of 2,000 horsepower) or for reservoirs only providing regulatory flows to down-stream (major) hydroelectric projects under Part I of the Federal Power Act for license or relicense, or amendment to license proposing construction or operating change in project works will be transmitted by the Commission to the Council on Environmental Quality, Environmental Protection Agency, and to appropriate governmental bodies, Federal, regional, State and local with

a request for comments on the environmental considerations listed in § 2.80 of this Part. Notice of all such applications shall also be made as prescribed by law.

(b) All applications covered by paragraph (a) of this section shall be accompanied by Exhibit W, the applicant's detailed statement of the environmental factors specified in § 2.80 and § 4.41. The Staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears, based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.81, the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested, supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

(c) All interveners taking a position on environmental matters shall file comments on the draft statement with the Commission including an explanation of their environmental position, specifying any differences with the applicant's detailed statement upon which intervener wishes

to be heard and including therein a discussion of that position in the context of the factors enumerated in § 2.80, at a time specified by the Commission or the Presiding Examiner. All interveners shall be responsible for filing ten copies of their filing with the Council on Environmental Quality and at least one copy with the Environmental Protection Agency at the time they file with the Commission and shall also supply a copy of such filing to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The comments of the Council on Environmental Quality, and the Environmental Protection Agency, if any, should be made in a written statement served upon the Commission's Secretary and all parties of record.

(d) The applicant, staff, and all interveners taking a position on environmental matters should offer evidence for the record in support of their environmental position, filed in compliance with the provisions of this section.

(e) In the case of each contested application the initial and reply briefs filed by the applicant, the staff, and all interveners taking a position on environmental matters should specifically analyze and evaluate the evidence in the light of the environmental criteria enumerated in § 2.80.

Furthermore, the Initial Decision of the Presiding Examiner in such cases shall include an evaluation of the environmental factors enumerated in § 2.80 and the views and comments expressed in conjunction therewith by the applicant and all those making formal comment pursuant to the provisions of this section. If the Commission grants the application, its final order shall include a final detailed environmental statement as specified in § 2.80.

(f) Ten copies of all comments from governmental bodies—Federal, regional, State, and

local—made pursuant to this section shall also be transmited to the Council on Environmental Quality and at least one copy shall be transmitted to the Environmental Protection Agency, to the applicant, and to the parties to the proceeding within 15 days of Commission grant of intervention by the party filing such comments.

§ 2.82 *Compliance With the National Environmental Policy Act of 1969 Under the Natural Gas Act.*

(a) A notice of all certificate applications filed under Section 7(c) of the Natural Gas Act (15 U.S.C. 717f(c)), except abbreviated applications filed pursuant to Section 157.7(b), (c), (d), and (e) of the Commission Regulations, will be transmitted by the Commission to the Council on Environmental Quality and the Environmental Protection Agency. Notice of all certificate applications will continue to be published as prescribed by law, and transmitted to other appropriate Federal and State governmental bodies.

(b) All applications covered by paragraph (a) of this section shall be accompanied by the applicant's detailed statement of the environmental factors specified in § 2.80. The staff shall make an initial review of the applicant's statement and issue, if necessary, any deficiency letters as to sufficiency of form. If it appears, based upon the application and the detailed statement, and a preliminary review thereof by staff, that the proposed action may be a major federal action significantly affecting the quality of the human environment, then staff shall cause the applicant's statement, as revised, to be made available to all interested governmental bodies and to the public for comments. For purposes of § 2.82 the applicant's draft statement, as modified pursuant to (b) of this section, shall be deemed to be in-

formation comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality. The Secretary of the Federal Power Commission shall cause prompt publication in the Federal Register of notice of availability of the applicant's statement, as modified pursuant to (b). A period of 45 days shall be afforded in which to submit written comments. The applicant shall, as requested, supply twenty-five copies or more of the statement, as revised (each copy to be accompanied by such supporting papers as are necessary) to the Federal Power Commission.

(c) All interveners taking a position on environmental matters shall file comments on the draft statement with the Commission including an analysis of their environmental position, specifying any difference with the applicant's detailed statement upon which intervener wishes to be heard and including therein a discussion of that position in the context of the factors enumerated in § 2.80, at a time specified by the Commission or the Presiding Examiner. All interveners shall be responsible for filing ten copies of their filing with the Council on Environmental Quality, and at least one copy with the Environmental Protection Agency at the time they file with the Commission and shall also supply a copy of such filing to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The comments of the Council on Environmental Quality, and the Environmental Protection Agency, if any, should be made in a written statement served upon the Commission Secretary and all parties of record.

(d) The applicant, staff, and all interveners taking a position on environmental matters should offer evidence for the record in support of their environmental position, filed in compliance with the provisions of this section.

(e) In the case of each contested application the initial and reply briefs filed by the applicant, the staff, and all interveners taking a position on environmental matters should specifically analyze and evaluate the evidence in the light of the environmental criteria enumerated in § 2.80.

Furthermore, the Initial Decision of the Presiding Examiner in such cases shall include an evaluation of the environmental factors enumerated in § 2.80 and the views and comments expressed in conjunction therewith by the applicant and all those making formal comment pursuant to the provisions of this section. If the Commission grants the application, its final order shall include a final detailed environmental statement as specified in § 2.80.

(f) Ten copies of all comments from governmental bodies—Federal, regional, State and Local—made pursuant to this section shall also be transmitted to the Council on Environmental Quality and at least one copy shall also be transmitted to the Environmental Protection Agency, to the applicant and to the parties to the proceeding within 15 days of Commission grant of intervention by the party filing such comments.

(B) The Commission amends § 4.41 Required Exhibits in Part 4, Subchapter B, Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations by adding immediately following Exhibit V, a new paragraph entitled Exhibit W to read as follows:

§ 4.41 Required Exhibits

* * * * *

Exhibit W. Applications covered by 18 CFR 2.81(a) shall be accompanied by an applicant's environmental statement. Such statement shall comply with the detailed requirements set down

in 18 CFR 2.80–2.81, and shall include a one-page summary of the statement. Furthermore, such statement with its supporting papers shall be self-contained.

(C) The amendments adopted herein shall be effective upon issuance of this order.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

[SEAL] KENNETH F. PLUMB,
Secretary.

467-518—72——5

APPENDIX E

United States of America, Federal Power Commission

Power Authority of the State of New York

Project No. 2685

Before Commissioners: John N. Nassikas, *Chairman;* John A. Carver, Jr., Albert B. Brooke, Jr., and Pinkney Walker.

ORDER DENYING MOTIONS AND APPEALS

(Issued October 29, 1971)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). While the license authorized construction of the project generally, Article 34 thereof specifically prohibited construction of the transmission lines until further Commission approval was given.

On November 24, 1969, PASNY applied for construction authorization under Article 34, filing exhibits showing the proposed designs and locations of the three transmission lines, one of which was to run from Gilboa, in Schoharie County, past Durham to the Leeds substation near Catskill, all in Greene County. On or about December 11, 1969, the Commission gave written notice of such application to Durham

and Greene County, among other municipalities, and commenced publishing notice in a newspaper published in Greene County, among other newspapers. Additionally, on December 18, 1969, the Commission published notice in the Federal Register (34 F.R. 19838).

Petitions to intervene were filed in January and February 1970 by Greene County Planning Board (Greene County); Town of Durham and Association for the Preservation of Durham Valley (collectively, Durham); Brooks Atkinson, Marshall Bell, Barry H. Garfinkel, Alfred Gelhorn, Arthur Goldschmidt, Walton McClure, Earl Morse, and Agnes O'Neil (collectively, Individual Intervenors); and Sierra Club.

On April 10, 1970, the Commission approved the application and exhibits insofar as they related to the two lines as to which no protests or petitions were filed, but it reserved consideration of the Gilboa-Leeds line (43 FPC 521). On May 19, 1970, the Commission granted all of the petitions to intervene including one which had been filed by Joe Segelman in February 1970.

After meeting with various persons interested in the affected area, and following additional studies, PASNY filed with the Commission on December 4, 1970, two alternative proposals for routing the Gilboa-Leeds transmission line. On or about January 13, 1971, the Commission again gave written notice to Durham and Greene County, among other municipalities, and commenced publishing notice in a newspaper published in Greene County, among other newspapers. Additionally, on January 22, 1971, the Commission again published notice in the Federal Register (36 F.R. 1074). On March 26, 1971, PASNY filed with the Commission and transmitted to the Intervenors its Environmental Report showing, among other mat-

ters, three possible variations of the two alternative proposals.

APPEAL FROM DENIAL OF MOTIONS FOR AWARD OF COUNSEL FEES AND EXPENSES

At a pre-hearing conference on June 22, 1971, Durham made a motion, which was joined by Greene County, for an order that the Commission, or alternatively, PASNY, pay or undertake to pay said Intervenors' expenses including counsel fees in the proceeding, to provide said Intervenors with copies of the transcripts of the proceeding without charge, and for other appropriate relief. Presiding Examiner William C. Levy denied the motion on the basis that *he* did not have authority to grant the relief requested. On July 2, 1971, Durham filed a Notice of Appeal to the Commission and, on August 9, 13 and 16, 1971, Durham, Greene County and Sierra Club, respectively, filed memoranda in support of said motion and appeal.

In its memorandum, Durham qualified its request, insofar as counsel fees are concerned, to such ". . . fees as the Commission may, at the conclusion of the proceeding, find have 'in fact been in the public interest.'" Sierra Club indicated that counsel fees and expenses should be awarded ". . . at the discretion of the Commission at the conclusion of the proceeding, based on the extent and value of the public services rendered by the Intervenors." While both of them request without elaboration that the motion be granted at an early date to enable Intervenors to prepare for the hearing, it is difficult to conceive how it would help particular Intervenors to prepare for the hearing if we should do as we are asked—to presently indicate that one or more Intervenors might

receive an indefinite sum based upon our future judgment as to the value of the public services rendered by the particular Intervenor(s). We doubt that such approach would secure contingent fee counsel or witnesses, and it certainly would not pay current expenses.

The central theme of all three memoranda is that the Intervenors represent the public interest, desire to assist the Commission, lack substantial financial resources to do so and, like PASNY, which has substantial resources, should be in a position ultimately to pass the costs of the proceeding to the public. All three memoranda rely in varying degrees upon the National Environmental Policy Act of 1969 (NEPA). In a memorandum filed on September 21, 1971, PASNY supported the Presiding Examiner asserting that there is no statutory or other authority to grant the requested relief.

Durham points to the broad authority given to the Commission in the Federal Power Act, as amended, including the authority in Section 309 "to perform any and all acts . . . necessary or appropriate to carry out the provisions of this Act", and in Section 314(c) to "employ such attorneys as it finds necessary . . . for proper representation of the public interests. . . ." While we do not dispute that these provisions give us broad authority to carry out our functions, including representation of numerous public groups and individuals with a variety of interests which sometimes compliment, and sometimes compete with, one another, they do not provide the broad authority, which Durham suggests, to transfer our operating funds to others in order to finance their activities in proceedings before this Commission.

Durham also asserts that under the "Supreme Court's recent landmark opinion" in *Mills* v. *The*

Electric Auto-Lite Company, 396 U.S. 375 (1970), it is appropriate for the Commission "under equitable principles to grant attorney fees without explicit statutory authority to do so." But *Mills* is a shareholders' action which, in order to avoid the unjust enrichment of those who benefitted from legal proceedings, permits the costs of such proceedings to be shifted to the beneficiaries; a footnote suggests that costs should be shifted only after the successful conclusion of a proceeding which results in a significant service. While the activities of particular Intervenors in the present proceeding involving the Gilboa-Leeds transmission line may ultimately result in a significant public service in the context of the local community such as the Town of Durham or Greene County, such service may not be significant in the context of the multiple, and sometimes larger, segments of the public served by this Commission.

Greene County asserts that while § 2.81 of the Commission's Rules of Practice and Procedure, implementing NEPA, requires both applicants and the Commission staff to file detailed environmental statements in uncontested proceedings, the Commission staff is not required to file such statements in contested proceedings. Instead, Greene County continues, § 2.81(c), requiring intervenors to file explanations of environmental positions, shifts the burden to them to analyze environmental impact in contested proceedings and, consequently, the Commission should finance those upon whom the burden is shifted.

While it is true that the Commission staff is not required to file detailed environmental statements in contested proceedings, it does not follow that intervenors are entitled to funds with which to prepare explanations of environmental positions. The Commission staff is required by *Scenic Hudson Preservation*

Conference v. *Federal Power Commission*, 354 F.2d 608 (1965), to make every effort to assure that the records of licensing proceedings are complete for the purpose of enabling the Commission to make judgments under the Federal Power Act and the National Environmental Policy Act of 1969 and ultimately include detailed environmental statements in its final orders. For this reason, the staff frequently goes to great lengths to make sure that different points of view and interests are fully represented in the record.

In Docket No. R–389A a consumer group filed a motion to be allowed an initial $10,000 payable by the Commission to enable the group to secure counsel and act as a public interest and consumer surrogate in lieu of the Commission. In our Orders dated August 28 and October 23, 1970, we denied the motion and a motion for rehearing, stating that "the Commission has not and will not abdicate its mandate to represent the public interest." In the latter Order we also rejected the argument that "anyone claiming to represent a consumer group should be permitted to intervene at Commission expense irrespective of the resources available to that person." While Durham and Greene County claim that they are seeking funds to assist, rather than to act in lieu of, the Commission, our policy not to abdicate our mandate to represent the public interest is equally applicable to them, and nothing in NEPA appears to require departure in this instance therefrom.

The only sworn statements in the record bearing upon the ability of any Intervenors to pay for transcripts or other expenses of the proceeding are contained in the personal affidavit dated August 4, 1971, of Barry H. Garfinkel, Esquire (Garfinkel), counsel for Durham, as follows: (1) that for 1971 the Town of Durham budgeted "$800 for its normal legal fees and expenses and is unable to allocate any monies for this proceeding",

and (2) "The Association for the Preservation of Durham Valley, an unincorporated association, with approximately 100 members, has only $50 in its bank account."

While we have not treated Garfinkel's affidavit as an application for leave to proceed *in forma pauperis*, the foregoing statements raise, rather than answer, questions respecting the resources available to such Intervenors. If Garfinkel, or any other Intervenor, desires copies of transcripts without charge, he may seek leave to proceed *in forma pauperis* by filing his affidavit together with those of each of his client-intervenors demonstrating their inability to purchase the portions of the transcripts pertinent to their respective interests.

APPEAL FROM DENIAL OF MOTION FOR ORAL NON-EXPERT TESTIMONY

On June 22, 1971, Presiding Examiner Levy also denied Durham's oral motion that its non-expert witnesses be permitted to testify at the hearing in person without the necessity of the prior filing of prepared written testimony, directing that all expert and non-expert testimony be filed in prepared written form in order to permit all participants to read the testimony prior to, and thereby facilitate and expedite, the hearing. On August 24, 1971, Durham filed a Notice of Appeal, in substance repeating its oral motion and asking that the Commission vacate those portions of the Presiding Examiner's June 22nd ruling and Notice dated August 6, 1961, as require that prepared written testimony of Intervenors' witnesses be submitted by November 2, 1971. Durham relies upon §1.22(a) of the Commission's Rules of Practice and Procedure which states that witnesses *shall* be examined orally unless a deposition is taken or a stipula-

tion is made by consent, or unless the Presiding Examiner orders that direct expert testimony be reduced to prepared written testimony.

It has become the practice in Commission proceedings that the direct testimony of substantially all witnesses, both lay and expert, be reduced to prepared written form; where the Presiding Examiner determines (e.g., due to the number of intervenors) that it is appropriate to control the receipt of testimony in order to facilitate and expedite a hearing, as he did in this case, he may and should order that the proposed direct testimony of non-expert witnesses be reduced to prepared written form. Subject to his continued control of the proceeding, it would be appropriate for the Presiding Examiner, upon motion at the hearing, to permit such lay witnesses to withdraw their prepared written testimony and testify orally as to those matters which were covered thereby and, subject further to a showing of good cause, to testify as to other relevant matters.

> We may add to the above discussion that it is much to be regretted that this Commission's time should be taken up with an appeal of this sort * * *. The litigation before this Commission ordinarily concerns matters of broad public interest, and it is expected that controversies on minor procedural matters be resolved with some spirit of accommodation and in a businesslike manner or by reference to the Examiner, who is far better acquainted with the situation than this Commission. *Indiana & Michigan Electric Company* and *Ohio Power Company,* 39 FPC 610, 612.

The foregoing passage is equally applicable to this appeal. The Commission's Rules of Practice and Procedure do not contemplate that a participant should appeal a Presiding Examiner's ruling on a procedural

matter simply on the basis of dissatisfaction. After an Examiner is designated by the Commission to preside at a hearing, procedural matters relating thereto should be considered and ruled upon by such Examiner pursuant to §§ 1.12(d) and 1.27(b)(7) both before and during the hearing. Motions before or during the hearing involving or constituting final determination of the proceeding, including motions during the hearing involving dismissal of the proceeding, are exclusively within the province of the Commission except where they are ruled upon as part of the Examiner's initial or recommended decision. All other motions before the hearing where immediate ruling is essential in order to proceed with the hearing, and all other motions during the hearing and prior to the submission of the Examiner's initial or recommended decision, should be considered and ruled upon by the Examiner, but may also be ruled upon by the Commission. While the Examiner may, within his discretion, refer any motions or certify any questions to the Commission, his rulings may not be appealed during the course of hearings or conferences except in extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest. Accordingly, the Commission will not reconsider an Examiner's ruling on a procedural matter unless the Examiner declines to rule upon the matter and refers or certifies it to the Commission, or unless the matter is appealable under § 1.28(a) as involving extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest.

We view Durham's motion as involving a procedural matter which is exclusively within the province of the Presiding Examiner. Since there is no showing that prompt decision by us is necessary to prevent

detriment to the public interest, and particularly since the motion may be renewed at the hearing insofar as requests may be made that particular non-expert witnesses be permitted to testify orally, reconsideration will be denied.

APPEALS FROM DENIAL OF MOTIONS FOR SCHEDULING DELAYS

On June 22, 1971, Presiding Examiner Levy set August 24, 1971, as the final date for filing PASNY's direct case; September 6, 1971, as the final date for filing Intervenors' statements of environmental positions and for receiving comments on PASNY's Environmental Report (detailed environmental statement); September 28, 1971, as the final date for filing Intervenors' direct cases, and October 5, 1971, as the commencement date of the public hearing. On July 21, 1971, PASNY filed a motion to extend from August 24, 1971, to September 28, 1971, the final date for filing its direct case, and to extend for a similar five week period (to November 2, 1971) the final date for filing Intervenors' direct cases. On July 29 and August 2, 1971, Durham and Greene County, respectively, filed replies in partial opposition. Durham asked that the final date for filing PASNY's direct case be set at 30 days after the Commission determines its foregoing motions to revoke the project license and to award counsel fees and expenses together with another motion to produce certain documents. Greene County proposed its own schedule based in part upon a claimed necessity of revising and recirculating PASNY's detailed environmental statement, and in part upon a claimed necessity of the Commission filing and circulating a detailed environmental statement. By Notice dated August 6, 1971,

Presiding Examiner Levy granted PASNY's motion and denied Durham's and Greene County's requests, thereby extending to September 28, 1971, the final date for filing PASNY's direct case; extending to November 2, 1971, the final date for filing Intervenor's direct cases; and setting November 9, 1971, as the commencement date of the public hearing. The Notice stated that,

> * * * it is not necessary, desirable or in the public interest to delay the hearing indefinitely pending Commission action * * * .

On August 24, 1971, Greene County filed a Notice of Appeal to the Commission, claiming without elaboration that unless the Commission adopts the schedule which it proposed, the Commission

> * * * will be in violation of the Natural Environmental Policy Act, the guidelines promulgated thereunder and its own Order 415. It will also be unable to fulfill its responsibilities under Section 10(a) of the Federal Power Act.

On October 4, 1971, Durham filed a Notice of Appeal to the Commission to postpone the commencement date of the hearing to an unspecified date after determination of the motions to revoke the pumped storage project license and the appeal from denial of the motions for payment of counsel fees and expenses, claiming without elaboration that "it *is* decidedly in the public interest that the hearing be postponed until the Commission acts on the motions."

By Notice dated September 15, 1971, the Presiding Examiner extended the final date for filing Intervenors' direct cases from November 2, 1971, to a date 45 days from the date on which certain documents demanded by Durham in litigation against the Commission are produced pursuant to Court order, or a date 45 days from the date on which it is stipulated

that production has been made. The Examiner did not, however, extend the commencement date of the public hearing from November 9, 1971.

As with the preceding appeal, Durham and Greene County do not attempt to show that prompt decision by the Commission is necessary to prevent detriment to the public interest. Instead, they simply ask the Commission to reconsider that which the Presiding Examiner found to be not in the public interest. For the reasons given in connection with the preceding appeal, reconsideration of such procedural matter will be denied to the extent that it has not become moot by the Presiding Examiner's Notice dated September 15, 1971.

MOTION FOR A HEARING SITE IN GREENE COUNTY

By Notice dated September 2, 1971, Presiding Examiner Levy fixed the Federal Court House in Albany, New York, as the place for commencement of the hearing on November 9, 1971. On September 13, 1971, the Honorable Hamilton Fish, Jr., Representative for the 28th Congressional District and an Intervenor (Congressman Fish), filed a motion (1) to vacate such Notice and move the site of the hearing to Greene County or, alternatively, (2) to schedule an additional hearing date at a site in Greene County. Congressman Fish points out that the Presiding Examiner's Notice dated August 6, 1971, stresses that the public session is intended to afford local residents and organizations a more convenient opportunity to be heard, present their positions, and have their views considered; and he suggests that a site in Albany, where PASNY's offices are located, may be inconvenient for many Greene County residents and, therefore, not accomplish such purpose.

At the time of the pre-hearing conference on June 22, 1971, certain Intervenors suggested that the hearing be held in Greene County rather than in Washington, D.C., where most Commission proceedings are held; and it was arranged that such Intervenors, upon returning to the Greene County area, would ascertain the suitability and availability of accommodations (hearing room, meeting rooms, hotel rooms and stenographic services) and so inform the Presiding Examiner. While Congressman Fish suggests the use of certain facilities in Greene County, he does not indicate their availability other than the Greene County Court House, which will be available from December 13 through 17, 1971, and, consequently, necessitate delay of the hearing. The matter of scheduling the hearing is peculiarly within the competence of the Presiding Examiner, and we would not be justified in overruling him unless his determination as to the needs of the parties in the light of the status of the proceeding had been entirely unreasonable, which is clearly not the case here. On the contrary, his choice of Albany, New York, the closest sizable city to Greene County (and 13 to 51 miles from all parts thereof) appears to be reasonable and should not, therefore, be disturbed.

For the reasons given in connection with the preceding two appeals, consideration of such procedural matter will be denied.

The Commission orders:

(A) Durham's appeal from the denial of its motion, joined by Greene County, to presently award counsel fees and expenses payable either by the Commission or by PASNY, to provide copies of transcripts without charge, and for other appropriate relief, is denied as to counsel fees and expenses and denied without prejudice as to transcripts; provided,

that participants who desire copies of transcripts but, due to financial hardship, are unable to purchase the portions thereof pertinent to their interests, should file with the Commission affidavits, under oath, seeking leave to proceed *in forma pauperis* and demonstrating that they are unable to purchase transcripts.

(B) Durham's appeal from the denial of its motion that non-expert witnesses be permitted to testify in person in direct examination at the hearing without the necessity of the prior filing of prepared written testimony, is denied without prejudice.

(C) Greene County's and Durham's appeals from the Presiding Examiner's Notice dated August 6, 1971, granting PASNY's motion for an extension and denying their requests for indefinite extensions, are denied without prejudice to the extent that they have not become moot by the Presiding Examiner's Notice dated September 15, 1971.

(D) Congressman Fish's motion to vacate the Notice dated September 2, 1971, and move the site of the hearing to Greene County or, alternatively, to schedule an additional hearing date at a site in Greene County, is denied without prejudice.

By the Commission:

[SEAL.] KENNETH F. PLUMB,
Secretary.

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